Supreme Court, U.S.
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No. 00-1321

IN THE

Supreme Court of the United States

BATH PETROLEUM STORAGE INC.,

Petitioner,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., TPC CORPORATION, AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The court of appeals' decision in this case presents two questions for this Court's review: (1) whether *Noerr-Pennington* immunity, which has been applied by this Court to date only in antitrust cases, applies to claims brought under the RICO statute; and (2) whether fraud or misrepresentation in the course of an administrative proceeding is immunized if the misrepresentation is not the basis of the administrative body's decision but nonetheless causes collateral harm. Despite the attempts of Market Hub Partners, L.P., and Market Hub Partners, Inc. ("Respondents") and Market Hub Holding Company ("MHHC") to obscure these issues, this case presents an excellent vehicle for this Court to resolve the conflicts that have arisen among the circuits that have considered them.

First, contrary to the Respondents' claim, there are courts of appeals – most prominently the Tenth Circuit – that consider *Noerr-Pennington* to be rooted in a construction of the Sherman Act, and thus have held the immunity applicable only in that context. This view, which is consistent with the pronouncements of this Court and inconsistent with the decision of the Second Circuit below, requires courts to construe the specific statute at issue before concluding that immunity analogous to *Noerr-Pennington* is applicable.

Second, Respondents obscure the question whether *Noerr-Pennington* should immunize fraudulent petitioning activity, by suggesting that Petitioner has urged this Court to recognize immunity for *any* misrepresentation, including unintentional misstatements that cause no anticompetitive harm. To the contrary, Petitioner objects to the materiality requirement as applied narrowly by the court of appeals. Given that *Noerr-Pennington* immunity protects against the collateral effects of litigation beyond the mere outcome, neither the Second

Circuit nor Respondents have explained why, as a constitutional or statutory matter, the sham exception should focus on the misrepresentation solely vis-à-vis the outcome of the litigation.

Finally, Respondents contend that this case is an inappropriate vehicle for this Court to resolve these open issues. Although the Second Circuit's decision is unpublished this does not cure the split among the circuits. It only means that the court's misinterpretation of *Noerr-Pennington* is settled law in that circuit. Moreover, the Second Circuit does not stand alone in its views, as the court squarely followed other courts of appeals in arriving at its decision. And, despite Respondent's assertion that the decision "turned on a 'detailed factual record ... set out by the district court,'" Opp. 3 (quoting App. 2a), this is both irrelevant and misleading. The case was decided on a motion to dismiss and thus provides a clean record on which to decide the pure legal issues posed by the holding below.

I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTIONS PRESENTED.

A. The Second Circuit's Decision Applying The *Noerr-Pennington* Doctrine Outside The Anti-Trust Context Conflicts With Other Courts Of Appeals, And With Decisions Of This Court.

The Second Circuit's conclusion that *Noerr-Pennington* immunity extends beyond the Sherman Act is in conflict with those cases that recognize that *Noerr-Pennington* is rooted in a construction of the Act itself. Pet. 10-11. Most recently, the Tenth Circuit held that although the First Amendment right to petition might confer immunity outside of the antitrust context, it is a misnomer to refer to it as "*Noerr-Pennington*" immunity. See *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir.) ("it is more appropriate to refer to immunity as *Noerr-*

Pennington immunity only when applied to antitrust claims"), *cert. denied*, 121 S. Ct. 175 (2000). The court explained that because the "first rationale for immunity – an interpretation of the Sherman Act – is not present" in other statutory settings, "[t]o the extent that Supreme Court precedent can be read to extend *Noerr-Pennington* outside of the antitrust context, it does so solely on the basis of the right to petition." *Id.*

Although *Cardtoons* stands in direct conflict with the Second Circuit's decision, Respondents attempt to distinguish it on the basis that it "involved state law claims that arose out of *pre*-litigation threats communicated between private parties," and thus did not resolve the question whether *Noerr-Pennington* applies outside the antitrust context to "core petitioning activity." Opp. 9. This is simply a misreading of *Cardtoons*. The court there recognized that the case involved pre-petitioning activities, but found that to be relevant only insofar as the First Amendment right to petition was concerned; its discussion of *Noerr-Pennington*, in contrast, clearly applied to both petitioning, and pre-petitioning, activities.

In an attempt to extend the protections of *Noerr-Pennington* beyond its original antitrust roots, Respondents obscure both the origin of the doctrine, and how this Court has subsequently treated it in other contexts. Respondents overstate the extent to which *Noerr-Pennington* is rooted in the First Amendment, arguing that "even if the *Noerr-Pennington* doctrine is technically a 'construction of the Sherman Act' (Pet. at 15-16), this Court's decisions make clear that such a construction was based *entirely* on principles arising from the First Amendment itself." Opp. 11 (emphasis added). However, this argument ignores this Court's primary rationale for *Noerr-Pennington*, unrelated to the First Amendment, that a contrary interpretation "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Eastern R.R.*

Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

Respondents similarly mischaracterize this Court's subsequent treatment of *Noerr-Pennington* in other contexts, stating that "*Noerr*'s First Amendment principles have been applied beyond the antitrust context." Opp. 11 (citing *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) ("*PREI*")). First, however, the Court made clear in *PREI* that it only extended the *Noerr-Pennington* doctrine "by analogy." 508 U.S. 49, 59 (1993). Second, in both cases that Respondents cite to support this proposition – *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) and *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983) – the Court only construed an immunity exception after thorough consideration of the statute at issue. See Pet. 16-17. In *Bill Johnson's*, for instance, the Court considered whether it was lawful for a State to enjoin an employer from bringing a retaliatory lawsuit. In concluding that the State could not, unless the suit were based on insubstantial claims, the Court explicitly relied on a construction of the National Labor Relations Act, informed by First Amendment principles, and not a direct application of *Noerr-Pennington*. See 461 U.S. at 741-45. The decision demonstrates the significance of this distinction because the Court actually provided for narrower immunity in the labor context: whereas a non-sham lawsuit is immune from all antitrust liability, the Court held that an employer who brought a non-sham retaliatory lawsuit could still be held liable for an unfair labor practice, although the lawsuit could not be enjoined. See *id.* at 749 ("although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis"); see also *Cardtoons*, 208 F.3d at 889 n.4 (discussing the distinction between immunity under the NLRA and *Noerr-Pennington* immunity).

Because petitioning activity is not absolutely immunized, see *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972) ("unethical conduct in the setting of the adjudicatory process often results in sanctions"), Respondents must at least offer an argument why *Noerr-Pennington* immunity should be extended to RICO violations. Whereas this Court has construed the Sherman Act only to cover *business* activities, *Noerr*, 365 U.S. at 136-37, there is no similar reason to impute to Congress an intent to exempt from RICO liability fraudulent *petitioning* activity, when the statute covers a wide array of criminal behavior. Thus, Respondents' sole response – that "[t]he antitrust laws, like RICO, reach intentional and criminal conduct," Op. 11 – is patently insufficient.

In response to Petitioner's argument that an expansive reading of *Noerr-Pennington* will unduly constrain states in policing misconduct in their courts and administrative agencies, Pet. 20-21, Respondents identify a competing concern – that limiting *Noerr-Pennington* to the Sherman Act, and allowing for an exception for fraud or other misrepresentations would create a flood of "indirect collateral attack[s] ... under the RICO statute or state law" in federal courts. Opp. 13. Respondents' concerns are grossly overstated because a RICO claimant could not file in federal court solely on the basis of an isolated instance of abuse of the state judicial process, but rather only upon proving a pattern of racketeering activity – a relatively high hurdle.

B. The Second Circuit's Narrow Construction Of The "Fraud Exception" To *Noerr-Pennington* Conflicts With Decisions Of Other Courts Of Appeals, And With Decisions Of This Court.

The Second Circuit's holding that only misrepresentations that are "material" to the outcome of the proceeding are excepted from *Noerr-Pennington* stands in conflict with other courts of appeals that recognize a more robust exception for fraud or other misrepresentations. Pet. 12-15. The Ninth

Circuit has spoken most clearly on this issue, holding that there is no "require[ment] that the body on whom the fraudulent misstatements are pressed ultimately believe those statements." *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1262 (9th Cir. 1982).

Respondents suggest that there is no conflict between the Ninth Circuit, on the one hand, and the Second – and Third Circuit which it follows – on the other. Respondents rely on the statement of the Third Circuit itself that "[o]ur approach in requiring that misrepresentations must be *material* to bar *Noerr-Pennington* immunity is consistent with the two other circuit courts of appeals that have considered this issue," one of which was the Ninth Circuit. *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119, 124 n.12 (3d Cir.) (citing *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir.), *cert. denied*, 525 U.S. 1140 (1999)), *cert. denied*, 528 U.S. 871 (1999). However, given that the Ninth Circuit has not abandoned its rejection of the materiality requirement in *Clipper Exxpress* – which was, in fact, cited in *Kottle*, 146 F.3d at 1060 – the Third Circuit's characterization of its opinion as consistent with the Ninth Circuit approach is unpersuasive. Although the Ninth Circuit stated in *Kottle* that *Noerr-Pennington* will not apply to intentional misrepresentations that "deprive the litigation of its legitimacy," this does not require that the judicial body *rely* on the misrepresentation. *Id.* Surely, as in this case, intentional misrepresentations that go to the substantive heart of the proceeding, and are made with the attempt to inflict collateral harm on a competitor "deprive the litigation of its legitimacy."

Respondents also argue that the Ninth's Circuit's fraud exception relies on a flawed interpretation of the *Walker Process* doctrine. However, nothing in *Walker Process* suggests a materiality requirement – rather, the thrust of the language quoted by Respondent (Opp. 15) centered on the *intent* of the patent holder, not the *materiality* of the misrepresentation. *Walker Process Equip., Inc.* v. *Food*

Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (distinguishing between "knowing[] and willful[] misrepresentation," which would be subject to antitrust liability, and "good faith" misrepresentation, or "'technical fraud,'" which would not). Moreover, the case that Respondents cite in support of their reading of *Walker Process*, *Nobelpharma AB* v. *Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998), makes clear that *Walker Process* and *Noerr-Pennington* represent two distinct lines of cases, each "provid[ing] its own basis for depriving a patent owner of immunity from the antitrust laws." *Id.* at 1071. Whereas *Noerr-Pennington* deals with the collateral harms of litigation, *Walker Process* deals with the particular problem of obtaining a patent through fraudulent means; as such, even were materiality relevant in the latter context, it surely would not be in the former.

Respondents further contend that an "immaterial misrepresentation exception to *Noerr-Pennington* immunity is inconsistent with First Amendment values." Opp. 16. First, however, Respondents' characterization of Petitioner as advocating an "immaterial misrepresentation exception" completely misstates its position. Petitioner has alleged that Respondents' misrepresentations were material – in the sense that they inflicted collateral harm – but not in the Second Circuit's narrow sense of being material *to the outcome* of the proceeding. Since the focus of the sham exception is on litigation used to inflict collateral harm, see *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) ("The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon"), it makes no sense to consider only the direct outcome of the litigation and not the collateral effect.

Second, in arguing that Petitioner's position is "inconsistent with First Amendment values," Opp. 16, Respondents do not explain why it is relevant from a First Amendment

perspective that a misrepresentation be material to the outcome of litigation, even if it causes collateral anticompetitive injury. Respondents' citation (*id.*) of general First Amendment platitudes is misplaced. Petitioner has not suggested that the fraud exception covers unintentional misrepresentations; rather, Petitioner has alleged that Respondents' misrepresentations were part of a pattern of *intentional* falsehoods, for which the First Amendment does not provide protection, even for political speech. *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.... [T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection"); see also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964).

II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO RESOLVE THE CONFLICTS AMONG THE CIRCUITS AND DETERMINE THE SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE.

Because this case squarely presents the two questions on which the Second Circuit and other courts of appeals have split – whether *Noerr-Pennington* applies outside the antitrust context and whether *Noerr-Pennington* immunizes misrepresentations that are not material to the outcome of the proceeding in which they were made – it is an excellent vehicle to resolve these questions.

Respondents maintain that because the Second Circuit's decision is unpublished, it does not constitute a formal opinion of the Circuit on which certiorari can be granted. A rule that would make publication a prerequisite for this Court's review, however, would allow courts of appeals to shelter their rulings from review simply by not publishing them. And, to the contrary, the Second Circuit's decision not to publish its opinion merely indicates that it considered the decision to be the well-settled law of the Circuit, and thus did

not require the formality of publication. Furthermore, the fact that the Second Circuit and district court below adopted the approach of other circuits – both in applying *Noerr-Pennington* outside the antitrust context, App. 2a, 32a, and in adopting a materiality requirement to the fraud exception, *id.* at 31a – without any independent reasoning indicates that the analysis of these courts of appeals has matured, making the circuit split that already exists on these issues ripe for resolution by this Court now.

Respondents also assert that the Second Circuit's decision relied on a "'detailed factual record ... set out by the district court,'" Opp. 3 (quoting App. 2a), and "an exhaustive review of the administrative record." *Id.* What Respondents obscure, however, is that this case was brought on a motion to dismiss under Rule 12(b)(6). For instance, Respondents repeatedly assert that Petitioner has not demonstrated that the alleged misrepresentations affected the proceedings in any way. See, *e.g.*, *id.* at 8 ("There is no way for Petitioner to establish, based on the underlying public record, that any statements the Respondents made independently 'delayed' the proceedings or that the Respondents caused CNGT to breach its lease with Petitioner"); *id.* at 16 ("The district court carefully examined the allegations of misrepresentations in light of the entire public record .... Petitioner could not demonstrate how any of the alleged misstatements affected the proceedings in any way").

At the motion to dismiss stage, a court must assume all factual allegations in the complaint to be true, *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), and Petitioner has plead facts sufficient to state a claim. Specifically, Petitioner has alleged that Respondents made false submissions to the Federal Energy Regulatory Commission ("FERC") to prevent Petitioner from gaining access to the natural gas storage market by: (1) delaying its permit approval process until Market Hub Partners ("MHP") could obtain approval of its own Tioga project; (2) increasing Petitioner's transactional

costs significantly to lead it to abandon its efforts to become a natural gas storage facility; and (3) causing sufficient delays to lead CNG Transmission Corp. ("CNGT") to terminate the lease agreement. App. 68a (Complaint ¶ 83). Further, Petitioner alleged that "it was clear that MHP and the other Defendants had been successful in delaying consideration by FERC of the use by CNGT of the Bath Storage Facility for the storage of natural gas." *Id.* at 69a (Complaint ¶ 85). And, "[i]n November 1997 CNGT informed [Petitioner] that as a direct result of MHP's and [the Coalition for Resources and Environment in the Southern Tier, Inc.'s] actions to thwart regulatory approval, it had determined to terminate the Lease Agreement with [Petitioner], which was finally accomplished in January 1998." *Id.* (Complaint ¶ 86). Because Petitioner has alleged facts sufficient to meet its pleading burden, and substantial legal questions arise directly from the decision of the courts below to dismiss, this Court's review is appropriate.

Finally, Respondent Market Hub Holding Company argues that "because alternative grounds support affirmance here, granting certiorari in this case cannot reasonably guarantee that Petitioner's *Noerr-Pennington* issues will be addressed." MHHC's Opp. 2. Surely there is no requirement for certiorari that no alternative grounds of affirmance can be asserted. MHHC's Opposition, which presents issues not addressed below and thus which are entirely irrelevant to the question whether this Court should review the Second Circuit's decision, only serves to cast doubt on MHHC's confidence in the holding under review. That doubt is fully justified, but it hardly supports leaving in place the square conflicts among the circuits.

CONCLUSION

For the reasons set forth in the petition and herein, the petition for certiorari should be granted.

Respectfully submitted,

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